

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILLIAM L. BIRD,

No. C05-02454 MHP

Petitioner,

**ORDER GRANTING CERTIFICATE OF
 APPEALABILITY AND GRANTING
 APPLICATION TO PROCEED IN
 FORMA PAUPERIS**

v.

JILL BROWN, Warden

Respondent.

Before the Court are Petitioner William L. Bird's Application for a Certificate of Appealability ("COA") pursuant to 28 U.S.C. § 2253 and Petitioner's Application to Proceed *In Forma Pauperis* on appeal. (Docket Nos. 28, 30.)

Pursuant to 28 U.S.C. § 2253, a Petitioner is required to obtain a COA from the district court prior to filing an appeal. A court may issue a COA when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The "substantial showing" may be satisfied where the petitioner demonstrates "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 483-84 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893-94 (1983)).

In the instant case, Petitioner contends that a COA should issue as to each of the two issues presented in the habeas petition: (1) whether it was constitutional error for the trial court, rather than a jury, to make the critical factual finding that rendered his prior conviction a "serious felony;" and

1 (2) whether, when making that factual finding, the trial court improperly utilized a preliminary
2 hearing transcript and probation report from the prior offense, given that Petitioner had no notice at
3 the time of the earlier offense, and no opportunity to then litigate, the “serious felony” issue. Upon
4 review, the Court finds that Petitioner has met the requirements for obtaining a COA and **GRANTS**
5 Petitioner’s request as to both issues.

6 As to Petitioner’s application to proceed *in forma pauperis* on appeal, 28 U.S.C. §
7 1915(a)(3) provides that an appeal may not be taken *in forma pauperis* if the district court
8 certifies that it is not taken in good faith. The appeal in this matter is taken in good faith, and
9 the Court **GRANTS** Petitioner leave to proceed IFP on appeal.

10 The Clerk shall forward this order along with the case file to the United States Court of
11 Appeals for the Ninth Circuit. *See United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

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13 IT IS SO ORDERED.

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15 Dated: 5/6/2008

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19 MARILYN HALL PATEL
20 United States District Court Judge
21 Northern District of California
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